

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE:        Joseph Iaciofano  
              Notice of Violation No. C-2623

DECISION AND ORDER

This matter is before the Hearing Officer pursuant to the Freshwater Wetlands Act R.I.G.L. § 2-1-18 et seq., as amended (hereinafter "Act"), R.I.G.L. § 42-17.1-2 and Chapter 42-17.6; statutes governing the Administrative Adjudication Division R.I.G.L. § 42-17.7-1 et seq.; the Administrative Procedures Act R.I.G.L. § 42-35-1 et seq., as amended; the duly-promulgated Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act; and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters ("DEM AAD Rules").

The Division of Groundwater and Freshwater Wetlands ("Division") of the Department of Environmental Management ("DEM") issued a Notice of Violation and Order ("NOVAO") to Joseph Iaciofano ("Respondent") on September 9, 1988.

The NOVAO alleged a violation of § 2-1-21 of the General Laws of Rhode Island, 1956, as amended, in that the Respondent proceeded to alter freshwater wetlands in three (3) instances without having first obtained the approval of the Director of the Department of Environmental Management. Said NOVAO alleged specifically that an inspection of property owned by Respondent and located west of poles 29 and 30 on Charles Street (Route

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246) approximately 700 feet south of the junction of Woodward Road and Old Louisquisset Pike (Route 246) Plat 23 C, Lot 759 in the Town of North Providence, Rhode Island, on September 1, 1988 at 8:50 a.m. revealed that in violation of R.I.G.L. § 2-1-21, Respondent did accomplish or permit alterations of freshwater wetlands by: (1) clearing, grading, excavating, constructing a road and installing a storm drain system into a swamp; (2) clearing and grading into that area of land within 50 feet of the edge of said swamp; and (3) filling and construction of a catch basin and pipes into an area subject to storm flowage.

Said NOVAO ordered the Respondent (1) to cease and desist immediately from any further alteration of the said freshwater wetland(s); (2) to restore said freshwater wetlands to their state as of July 16, 1971, insofar as possible before October 30, 1988; (3) to contact the Department prior to the commencement of restoration in order to ensure proper supervision by the Department; and (4) to pay a total administrative penalty in the sum of Two Thousand Two Hundred Fifty Dollars (\$2,250.00) within ten (10) days of receipt of said NOVAO. Respondent thereupon requested a hearing on the NOVAO.

Patricia C. Solomon, Esq., represented the Division and Elaine T. Bucci, Esq., represented the Respondent.

The Administrative Adjudication Division conducted a Prehearing Conference ("PHC") and the requisite PHC Record was prepared by the Hearing Officer who conducted said PHC. No requests to intervene were presented.

The adjudicatory hearing was held on August 12 and 13, 1992, and the Hearing Officer was in receipt of the post-hearing briefs on or about November 27, 1992.

The Division bore the burden of proving by a preponderance of the evidence that the Respondent violated the Act as alleged, and that the Department is entitled to the relief requested in the Restoration Order and Penalty Assessment as set forth in the NOVAO.

The following were admitted as Division's exhibits:

- Div. 1. Site Inspection Report prepared on December 13, 1990 by David Vitello.
- Div. 4. Site Inspection Report prepared by Harold K. Ellis on September 8, 1988 (2 pp.).
- Div. 5. Six photographs taken on September 8, 1988 by Harold K. Ellis (4 pp.).
- Div. 6. Notice of Violation and Order dated September 9, 1988 (3 pp.).
- Div. 7. Wetlands Inspection Report prepared on September 1, 1988 by Harold K. Ellis (3 pp.).
- Div. 8. Complaint Data Sheet dated August 24, 1988.
- Div. 9. Letter to Carmine Asprinio regarding the site and received by the Division on August 23, 1988.
- Div. 10a. Certified copy of deed.

Div. 10b. Certified copy of tax list.

Div. 11. Resume of Harold K. Ellis (3 pp.).

Div. 13. Resume of Stephen G. Morin (2 pp.).

Div. 14. Plan of Division of Land for Joseph Iaciofano by Philip S. Mancini, Jr., P.E., dated March 18, 1988.

Division's exhibits for identification numbered 2,3 and 12 were not admitted as full exhibits:

The following were admitted as Respondent's exhibits:

Resp. 1. Plan showing original route of drain and new routing of drain.

Resp. 3. Letter dated August 12, 1988 from Leo J. Perrotta to Joseph Iaciofano.

Resp. 4. Letter dated April 25, 1989 from Joseph Iaciofano to Leo Perrotta.

Resp. 5. Resume of Philip S. Mancini, Jr.

Respondent's exhibit No. 2 for identification was not admitted as a full exhibit.

Joseph Iaciofano, the Respondent, was the first witness called by Division. The parties thereupon stipulated that "Mr. Iaciofano, the Respondent, is the owner of the property involved in the Notice of Violation No. C-2623, which is the subject of this hearing."

Respondent testified that shortly before September 1, 1988, he contracted with certain parties to perform services on said property, viz: (1) C. Pezza to do certain filling; (2) someone

to remove logs; (3) Mr. Mancini as engineer to lay out the repair of the existing drain; and (4) C. Pezza & Sons, to install a catch basin, pipes and storm drains. Mr. Iaciofano acknowledged that he did not apply for a freshwater wetlands' permit for said work.

Harold K. Ellis, Enforcement Supervisor for the Division of Freshwater Wetlands, was called as the next witness for the Division. He was qualified as an expert in wetlands ecology, aerial photograph interpretation and as a natural resource specialist. He testified that his review of 1985 aerial photographs, and the site inspection and certain measurements taken by him enabled him to determine that certain wetlands were present on the subject property, consisting of a swamp greater than three acres in size, a 50-foot perimeter wetland associated with said swamp, and also an area subject to storm flowage.

Mr. Ellis visited the subject property on September 1, 1988 and observed that a dirt roadway and a storm drainage system was under construction in the aforesaid wetlands. He re-inspected the site again about one week later and observed additional filling (truckloads of sand) in the area subject to storm flowage and in the fifty-foot buffer of the swamp and also log/tree cutting being conducted in the wetlands.

This witness testified that he observed recent soil disturbance, clearing, grubbing, grading, logging and excavation within the swamp and fifty-foot perimeter wetlands. He described the catch basin, pipes and related fill that were placed within the swamp and the area subject to storm flowage on Respondent's property. He stated that approximately 14,700 square feet of swamp, as well as 1,200 square feet of fifty-foot perimeter wetland associated with the swamp, had been altered. He explained that filling and dumping of material foreign to the wetland, as well as excavation and construction of a catch basin and pipes, had occurred within the area subject to storm flowage on the subject property.

It was the testimony of Mr. Ellis that he consulted the Rules and Regulations and utilized the guidelines to assess the administrative penalties that were imposed for each of the subject violations. Based on the criteria, he determined that the violation for alterations to the swamp came within the "major" category under the Regulations. This was a large alteration (14,700 square feet) and there were permanent structures (drain system and catch basins) in place, and therefore, he assessed the full penalty of \$1,000.00. He assessed the smaller penalty of \$250.00 for the violation that occurred within the fifty-foot perimeter wetland, which he determined was "minor", because a smaller area was altered

(1,200 square feet). The penalty of \$1,000.00 was assessed for the violation in the area subject to storm flowage because this was considered "major", in that permanent structures had been constructed (which blocked the flow of surface water) and the resultant flooding issues were significant.

Mr. Ellis further testified that a search of the DEM files revealed that Mr. Iaciofano had not applied for a permit to alter freshwater wetlands. Also, that in order to restore the wetlands to their original state, it would be necessary to remove the catch basin, pipes and fill, regrade the excavated holes, replace the soils, replant trees and shrubs similar to those destroyed, and re-seed the area with certain wildlife grasses.

Stephen G. Morin, Assistant to the Director of DEM, was the next witness called by the Division. He was formerly the Chief of the Division of Groundwater and Freshwater Wetlands and, during the course of such duties, he issued the instant NOVAO that was prepared by Mr. Ellis. Mr. Morin testified that he reviewed the inspection reports, photographs, documents and pertinent information, and he was satisfied with their accuracy, as well as Mr. Ellis's recommendations for restoration and penalty assessments.

Leo Perrotta, Chief of Staff to the Mayor of the Town of North Providence ("Town"), was the first witness called by Respondent. He testified that in August of 1988, the Town agreed to provide supervision, assistance and guidance to the Respondent for the construction of a drain to correct the flooding problem. Mr. Perrotta stated that he and other Town employees had visited the site in response to complaints about flooding from area residents.

Mr. Iaciofano was the next witness to testify for Respondent. He has been in the real estate and construction business for thirty-one (31) years. He testified that he was not aware of the Town drainage system when he purchased the subject property in 1986; however, during 1987 he became aware that said system was not functioning properly.

This witness contacted numerous Town officials about the flooding problems, and eventually the Town authorized him to repair its drainage system on the Respondent's property. He contacted Philip Mancini, an engineer, during 1987 to prepare a plan for the repair of the drainage system. The plan prepared by the engineer provided for a completely enclosed drainage system with future catch basins. Respondent stated that construction of said system was commenced without applying to DEM for a permit, because he felt he was merely repairing an existing drainage system.



It was elicited in cross examination of Mr. Iaciofano that he had reviewed the "Plan of Division of Land" that was prepared by the engineer dated March 18, 1988, and that said plan depicted the presence of swamp throughout the area where the culvert and pipe are located by the use of symbols. He also acknowledged that he had observed the backup of water on the subject property to a depth of from one foot to three feet approximately 15 times in the past 25 years. Respondent affirmed that he had contacted said engineer to lay out a development for thirty-two (32) house lots on said property, on which Mr. Iaciofano planned to build and sell homes.

Philip G. Mancini, Jr., a civil engineer in the State of Rhode Island, testified next for Respondent. He was qualified as an expert witness as an engineer and as a specialist in drainage systems. He testified that he was engaged by Mr. Iaciofano in 1987 to perform site studies of the subject property in order to divide it into buildable lots. The existing drainage system on said premises was described by this witness. He explained that there was an existing pipe coming from an abutting subdivision which ended approximately at the property line of the subject parcel. There were swales or random ditches to guide the water through the subject property so that the drainage flowed away from said property via an outfall pipe under Charles Street.

This witness observed large backups of water throughout the property during any storms. He attributed this to the fact that the outfall pipe under Charles Street had not been maintained and that it was nearly full with debris. Mr. Mancini prepared and submitted to Mr. Iaciofano several designs to subdivide the property into a street pattern. The street plan and profile for the pattern of roads that was finally agreed upon for the division of said property was prepared by Mr. Mancini in March of 1988.

Mr. Mancini testified during cross examination that he had informed the Respondent during 1988 that Respondent should apply to DEM Wetlands Section for a permit to alter the area designated as swamp (by the swamp symbols on the plan prepared by Mr. Mancini). Mr. Mancini acknowledged that if the existing outfall culvert (which had caused a pooling of water in that area because it had become somewhat blocked) had been maintained properly and cleared of obstructions, it would have worked properly.

Respondent's arguments concerning the unconstitutionality of the procedures for determining liability and the imposition of administrative penalties by the DEM (without a jury trial in enforcement matters) is not properly before this administrative tribunal and will not be further addressed by this Hearing Officer.

The evidence introduced by Division clearly establishes that (1) the Respondent was the owner of the subject property at all pertinent times; (2) there were freshwater wetlands present on the subject site which are subject to the jurisdiction of the DEM, consisting of a swamp, its associated 50-foot perimeter wetland and an area subject to storm flowage; (3) said freshwater wetlands were altered by the Respondent, his agents and/or servants, after the enactment of the Act and just prior to the issuance of the NOVAO; (4) no permit was issued by the DEM for said alterations, and they were not authorized as required by the Act. The testimony of the Division's expert, Mr. Ellis, in this regard was, indeed, positive and uncontroverted. Said evidence was unchallenged and not discredited either by other positive testimony or by circumstantial evidence extrinsic or intrinsic and is therefore deemed conclusive upon this Hearing Officer as the trier of fact. State v. A. Capuano Bros., Inc., 120 R.I. 58 (1978).

Respondent argues that the Division did not meet its burden of proving that Mr. Iaciofano altered a freshwater wetlands, because it failed to prove (1) that the clearing and grading by Mr. Iaciofano disrupted the soil stability or the existing topography, and (2) that Mr. Iaciofano constructed a road on said property. It is maintained by Respondent that according to the Regulations, tree cutting, where no disruption of soil

stability exists, shall not be considered an alteration. Also that the alleged road was merely a dirt pathway which was created by the passing of vehicles.

It is essentially Respondent's position that the work performed on his property was merely a repair of the Town's existing drainage system and not an alteration, and therefore, it cannot be considered a violation. Respondent's reliance on the Act and Regulations to support this position is misplaced. A clear reading of the statute and Regulations demonstrates that the violations for which the Respondent was cited in the NOVAO are such alterations as are prohibited by the Act and the Regulations.

R.I.G.L. § 2-1-21(a) provides that:

No person \* \* \* may excavate; drain; fill; place trash, garbage, \* \* \* or other materials or effluents upon; \* \* \* add to or take from or otherwise alter the character of any freshwater wetlands as herein defined without first obtaining the approval of the Director of DEM.

R.I.G.L. § 2-1-23 provides that:

In the event of a violation of 2-1-21, the director of environmental management shall have the power to order complete restoration of the fresh water wetlands area involved by the person or agent responsible for the violation. \* \* \*

R.I.G.L. § 2-1-24(a) provides that:

Whenever any person \* \* \* shall commence any activity set forth in § 2-1-21 without first having obtained the approval of the director, or violates any rule or regulation of the director, the director shall have

the power by written notice to order the violator to cease and desist immediately and/or restore the wetlands to their original state insofar as possible.  
\* \* \*

Section 2.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act provides the following definition:

The terms "alter" (verb) and "alteration" (noun) shall include, but not be limited to, excavation; drain installation; filling; drainage discharge; directing effluents or surface water flows into or out of; grading; diking; damming; diverting; adding to or taking from; or otherwise changing the character of any freshwater wetlands.

Section 2.02(b) provides that:

Activities which will not under normal circumstances be considered alterations shall include: (1) Selective tree cutting where no disruption of soil stability or existing topography is allowed.

The Respondent's position that no permission was required finds no support in the language of the statute and is refuted when considered in the clear light of the Act's purposes. The intention of the Act is to preserve wetlands in this State as they existed when the Act was passed in 1971, unless permission is granted by the director to allow alterations. Our Rhode Island Supreme Court held in a similar matter that as a matter of law "prior approval of the director always is required before a person can lawfully alter a wetland." Wood v. Davis, 488 A.2d 1221 (R.I. 1985).

Clearing, grading, excavating, filling and the placing of earth or other materials, as well as adding to or otherwise altering the character of any freshwater wetlands are all specifically prohibited without prior approval of the Director. The evidence amply demonstrates that trucks were dumping fill, trees were being cut, and a catch basin and pipes had already been constructed in the freshwater wetlands without the approval of the Director as cited in the NOVAO.

Such alterations are clearly in contravention of both the spirit and the letter of the Act and the Regulations. The Respondent's own testimony, as well as that of his expert establishes that prohibited alterations were conducted in the wetlands.

The Division has conclusively proven that freshwater wetlands were present on the subject property owned by Respondent, and also that the Respondent by his agents or servants, cleared, graded, excavated, constructed a road and was installing a storm drain system into a swamp; and cleared and graded within fifty feet of said swamp; and filled and constructed a catch basin and pipes in an area subject to storm flowage in violation of § 2-1-21; therefore, the Division is entitled to equitable relief in accordance with § 2-1-24. State v. Distant, 455 A.2d 305 (R.I. 1983).

Respondent's argument that the order of restoration is not warranted under the circumstances and that, the penalty is excessive are not persuasive. The Respondent failed to rebut the Division testimony that complete restoration is required to remedy the violations on the site. R.I.G.L. §§ 2-1-23 and 2-1-24 empower the Director to order complete restoration of unlawfully altered wetlands. The "complete restoration" sought by the Division is authorized by the statute and the evidence mandates that such relief be ordered in the instant matter. Any question concerning interpretation of the words "complete restoration" is resolved by giving them the meaning most consistent with the policies and obvious purposes of the Act. Gryguc v. Bendick, 510 A.2d 937 (R.I. 1986).

Mr. Ellis's testimony as to the need for complete restoration of the site and the manner and time for it to be accomplished was not disputed, and I found same to be most credible. Although the Respondent has expended considerable time and effort on his project, his failure to follow the requisite procedures to seek DEM approval cannot be excused nor his activities condoned.

The Division's evidence establishes that the administrative penalties were imposed in accordance with the governing statutes and Rules and Regulations for the Assessment of Administrative Penalties. The alteration to the swamp was properly determined

to be major and the maximum penalty of One Thousand Dollars (\$1,000.00) is warranted for this violation because of the size of the alteration (approximately 14,700 square feet of swamp) and also because permanent structures were constructed therein. The alteration to the 50' perimeter wetland associated with the swamp was properly determined to be minor because the amount of the area was smaller than the area in the swamp. The lesser penalty of Two Hundred Fifty Dollars (\$250.00) is warranted for this violation because only approximately 1,200 square feet of said perimeter wetland was altered. The alteration to the area subject to storm flowage was determined to be major and the maximum penalty of One Thousand Dollars (\$1,000.00) is warranted for this violation because of the permanent structures constructed therein and the significance of said alteration in terms of the flooding issues involved.

The testimony of the Division's expert witness establishing the basis for determining the amount of the penalty to be imposed was uncontroverted at the hearing and the assessment of penalties totalling Two Thousand Two Hundred Fifty Dollars (\$2,250.00) for said violations is appropriate and fully warranted under the circumstances.

#### FINDINGS OF FACT

After reviewing the documentary and testimonial evidence of record, I find as a fact, the following:



1. The Respondent Joseph Iaciofano owned property located west of Poles 29 and 30 on Charles Street (Route 246) approximately 700 feet south of the junction of Woodward Road and Old Louisquisset Pike (Route 246) and identified as Plat 23C, Lot 759 in the Town of North Providence, Rhode Island ("site") at all times relevant to the instant hearing.
2. On September 1, 1988, the Department inspected the subject site and discovered freshwater wetlands alterations on the site, consisting of clearing, grading, excavating, constructing of a road and installing a storm drain system into a swamp, clearing and grading into that area of land within 50 feet of the edge of the swamp and filling and construction of a catch basin and pipes into an area subject to storm flowage.
3. On September 8, 1988, the Department observed further freshwater wetlands alterations occurring on the site.
4. The Department issued a Notice of Violation and Order ("NOVAO") to Joseph Iaciofano on September 9, 1988 for altering freshwater wetland on his property.
5. Joseph Iaciofano filed a request for an administrative hearing.
6. State jurisdictional freshwater wetlands exist on Respondent's property, consisting of a swamp, its associated fifty (50) foot perimeter wetlands and an area subject to storm flowage.
7. The freshwater wetlands on Respondent's property were altered by Respondent, his agents or servants, on or just prior to September 1, 1988 by (a) clearing, grading, excavation, construction of a road, and installation of a storm drain system, over an area of approximately 14,700 square feet; (b) clearing and grading into that area of land within 50 feet of the edge of the aforementioned swamp over an area of approximately 1,200 square feet; (c) filling and construction of a catch basin and pipes into an area subject to storm flowage.
8. Joseph Iaciofano did not file an application with the Department to alter freshwater wetlands on the site, nor did he receive a permit for such alterations.

9. The Division has jurisdiction over the freshwater wetlands located on the Respondent's subject property.
10. The freshwater wetlands on the subject site were altered after the enactment of the Freshwater Wetlands Act ("Act") and without a DEM wetlands alteration permit and were therefore in violation of the Act.
11. Complete restoration of the freshwater wetlands on the site is necessary in order to restore the wetlands to their natural, unaltered condition.
12. The administrative penalty assessed against Joseph Iaciofano in the total amount of Two Thousand Two Hundred Fifty Dollars (\$2,250.00) is not excessive and is reasonable and warranted.

#### CONCLUSIONS OF LAW

Based upon all of the documentary and testimonial evidence of record, I conclude as a matter of law that:

1. The DEM has jurisdiction over the freshwater wetlands located on Respondent's property.
2. The freshwater wetlands located on Respondent's property were altered without a wetlands alteration permit from DEM.
3. The Division had reasonable grounds to believe that the Respondent and/or his agents violated the Freshwater Wetlands Act which warranted the issuance of the NOVAO to the Respondent.
4. The Division has proved by a preponderance of the evidence that Joseph Iaciofano is responsible for all of the alterations of the freshwater wetlands on the subject property of Respondent.

5. The freshwater wetlands on Respondent's property were altered by Respondent in violation of § 2-1-21 of the R. I. Gen. Laws and the regulations promulgated pursuant thereto, as alleged in the NOVAO dated September 9, 1988.

6. The Department is entitled to the relief requested in Restoration Order and Penalty as set forth in the NOVAO.

7. The NOVAO should be affirmed in its entirety (except as modified herein as to dates and times).

8. The Respondent must comply with the Restoration Order as set forth in the NOVAO and completely restore the subject wetlands in accordance with the requirements of the Department's Division of Freshwater Wetlands no later than May 30, 1993.

9. The Respondent must pay a total administrative penalty of Two Thousand Two Hundred Fifty (\$2,250.00) to the Department no later than ten (10) days after the date the Final Order is signed by the Director.

WHEREFORE, it is hereby

ORDERED

1. That the Notice of Violation and Order and Penalty issued to the Respondents dated September 9, 1988 be and is hereby sustained.

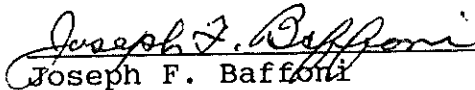
2. That the Respondent restore said freshwater wetlands to their state as of July 16, 1971 insofar as possible within sixty (60) days of the date of the Final Order herein.

3. That the Respondent contact the Division of Freshwater Wetlands of the Department of Environmental Management prior to the commencement of restoration to ensure proper supervision and to obtain the required restoration details from the representatives of said Division.

4. That the Respondent pay a total administrative penalty in the sum of Two Thousand Two Hundred Fifty Dollars (\$2,250.00) for said violations no later than ten (10) days after the date the Final Order is signed by the Director. Said payment shall be made directly to:

Rhode Island Department of Environmental Management  
ATTENTION: Robert Silvia  
Office of Business Affairs  
22 Hayes Street  
Providence, RI 02908

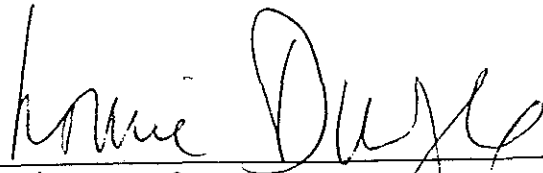
Entered as an Administrative Order this 1st day of  
MARCH, 1993 and hereby recommended to the Director  
for issuance as Final Order.

  
\_\_\_\_\_  
Joseph F. Baffoni  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill, Third Floor  
Providence, RI 02908  
(401) 277-1357

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Entered as a Final Order this 5<sup>th</sup> day of March,

1993.

  
\_\_\_\_\_  
Louise Durfee  
Department of Environmental Management  
22 Hayes Street  
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded via regular mail, postage prepaid to Elaine T. Bucci, Esq., Bucci Law Offices, 1920 Mineral Spring Avenue, North Providence, RI 02904 and via interoffice mail to Patricia C. Solomon, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 5<sup>th</sup> day of March, 1993.

  
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Jeffrey R. Scott